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Supreme Court, U.S.
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No. 93-2091

In the Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM H. FLEMING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of conspiring to avoid payment of transfer taxes imposed by the National Firearms Act, and of knowingly making false statements on a government transfer application form.

2. Whether the jury was adequately instructed concerning petitioner's theory of defense.

3. Whether application of the rule of lenity requires reversal of petitioner's convictions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 19 F.3d 1325.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1994. The petition for a writ of certiorari was filed on June 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted on two counts of conspiracy to violate the transfer tax provisions of the National Firearms Act, in violation of 18 U.S.C. 371, and one count of making a false statement in an application for a firearms transfer tax exemption, in violation of 26 U.S.C. 5861(*l*).[1] Petitioner was sentenced to three concurrent 46-month terms of imprisonment, to be followed by two years' supervised release. Pet. App. 1a-2a, 16a-21a. The court of appeals affirmed. Pet. App. 1a-15a.

1. The National Firearms Act (NFA), 26 U.S.C. 5801 *et seq.*, defines the term "firearm" to include any machinegun or silencer. 26 U.S.C. 5845(a). Section 5811(a) of the NFA imposes a tax of $200 on the transfer of any covered firearm. In general, no covered firearm may be transferred unless the transferor has filed a transfer application with the Bureau of Alcohol, Tobacco and Firearms (BATF), the application has been approved, and the tax has been paid. See 26 U.S.C. 5812(a). The statute does, however, exempt from tax certain transfers, including transfers "to any State, * * * any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations." 26 U.S.C. 5853(a).

Anyone wishing to make a tax-exempt transfer of a firearm to a law enforcement entity must secure advance approval from BATF by submitting BATF Form 5,

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[1] The jury was unable to reach a verdict as to one additional conspiracy count and two additional false statement counts. Two counts alleging unlawful receipt and possession of firearms were dismissed on the government's motion. Pet. App. 16a-17a.

"Application for Tax Exempt Transfer and Registration of a Firearm." See 26 U.S.C. 5853(c); 27 C.F.R. 179.90(b) (*reprinted at* Pet. App. 60a-62a). In filling out that form, the transferor must check a box describing the applicable category of tax-exempt transfer and sign a statement under penalties of perjury declaring that he has examined the application and that its contents are "true, correct, and complete" to the best of his knowledge and belief. See Pet. App. 49a (reproducing form).

As summarized by the court of appeals (Pet. App. 3a-4a), the government's evidence at trial showed that petitioner, a federally licensed firearms dealer, brokered the sale of regulated firearms through the use of sham transfers designed to take advantage of the transfer tax exemption for law enforcement agencies. In one transaction, petitioner agreed to find a purchaser for six machineguns owned by a gun collector named George Gibbons. Petitioner later informed Gibbons that he had arranged for the Seminole, Oklahoma, Police Department to take the guns. Petitioner sent Gibbons a completed BATF Form 5 reflecting a tax-free transfer to the Department, which Gibbons signed and sent to BATF. After receiving approval from BATF, Gibbons shipped the guns to the Department, where they were received by then-Chief Hunter Mixon. Mixon in turn delivered the guns to Stephen Scribner, a reserve officer with a different police department and a former firearms dealer. Petitioner subsequently located a purchaser for the machineguns, whereupon the Seminole Department obtained approval for tax-free transfer of the weapons to that purchaser, Scribner delivered them to petitioner, and petitioner delivered them to the ultimate buyer. Scribner testified at trial that the six machineguns were transferred to the Seminole police so that petitioner

could save $1,200 in transfer tax. II Tr. 111-119; Pet. App. 7a.

In the second transaction (see Pet. App. 4a), petitioner engaged in a similar scheme involving the sale of two machineguns and two silencers to Scribner and Clayton Badger, a local attorney, through the Creek County, Oklahoma, District Attorney's office. Scribner and Badger testified that they agreed to buy the firearms from petitioner, and that the three of them discussed ways to "paper" the transaction. *Ibid.*; see II Tr. 137-138, III Tr. 400-414. After preparing the necessary forms and securing BATF approval to transfer the firearms tax-free from himself to the District Attorney's office, petitioner delivered the firearms directly to Scribner and Badger. He then prepared a second set of BATF forms requesting approval of a tax-free transfer from the District Attorney's office to Scribner and Badger. The District Attorney's office never actually received or delivered any of the firearms involved. Badger testified explicitly that the purpose of "papering" the transfer of the firearms through the District Attorney's office was to avoid payment of the transfer tax. Pet. App. 7a-8a; III Tr. 403.

2. A jury convicted petitioner of conspiracy to violate the firearms transfer tax provisions in connection with both of the transactions described above, and of making a false statement in an application for tax exemption in connection with the second transaction. Pet. App. 1a-2a. The court of appeals affirmed. Pet. App. 1a-15a.

The court of appeals rejected (Pet. App. 5a-8a) petitioner's argument that the term "transfer" as defined in the NFA is broad enough to embrace sham "transfers" like those involved in this case, that his motive in arranging to make firearms transfers through law enforcement agencies was irrelevant, and that all the

statements he made on BATF application forms were literally true. The court held instead that the jury could look to the substance and not merely the form of petitioner's transfers, and that a reasonable jury could have concluded from the evidence that the transactions in question were shams that fell outside the intended scope of the statutory and regulatory tax exemption.

The court dismissed (Pet. App. 9a) petitioner's claim that the term "transfer" as used in the NFA is sufficiently vague to invoke the rule of lenity. Because "sham transactions set up solely to avoid the payment of the transfer tax" were "not transfers under any definition of the term," there was no ambiguity in the application of the statute to the facts of petitioner's case. *Ibid.*

Finally, the court rejected (Pet. App. 14a-15a) petitioner's argument that the district court erred in refusing his request for a jury instruction based on *Cheek* v. *United States*, 498 U.S. 192 (1991), which would have required the jury to find that he had "willfully" evaded the transfer tax and would have made his subjective good faith a defense. The court held that because petitioner's "crime was not merely evading the payment of taxes, but setting up sham transactions in order to mislead the BATF," there was no error in refusing to give the requested instruction on "willful" evasion.[2] Pet. App. 15a.

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[2] The court of appeals also rejected petitioner's claims that the government's transfer regulations were promulgated in violation of the Administrative Procedure Act, 5 U.S.C. 552 (Pet. App. 8a-9a); that the two conspiracy counts were multiplicitous (*id.* at 9a-10a); that the government failed to comply with the disclosure requirements of *Brady* v. *Maryland*, 373 U.S. 83 (1963) (Pet. App. 11a-13a); and that the trial court improperly admitted certain rebuttal evidence (*id.* at 13a-14a).

ARGUMENT

1. Petitioner contends (Pet. 8-20) that he was improperly convicted because the NFA defines the term "transfer" so broadly that it includes "every physical transfer" (Pet. 18) of a regulated firearm.[3] Petitioner argues that a "transfer" occurs "any time the firearm changes actual, physical possession," Pet. 12, and that any physical transfer of a firearm to or from a law enforcement agency is tax exempt, even if made as part of a conspiracy to transfer the firearm from the original transferor to an ultimate, non-exempt transferee. Petitioner claims (Pet. 12-13) that in each of the transactions for which he was convicted, "the transferors made application and received approval from BATF to transfer the firearms to the transferees at which time physical possession of the firearms was delivered to the transferee," and therefore each of the transfers was legally exempt from tax, petitioner did not fail to pay any tax due, and petitioner made no false statement on any BATF form.

The court of appeals properly rejected petitioner's contentions. First, as the court observed (Pet. App. 4a, 8a), the evidence at trial disclosed that the machineguns and silencers involved in the transaction with Scribner and Badger were delivered to them directly by petitioner; "[n]o firearms were ever received or delivered by the Creek County District Attorney's Office." See also III Tr. 407-408. Thus, whatever the merits of petitioner's "physical transfer" theory, it does not support his position with respect to that transaction or with respect to the related false statement count—which is the only

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[3] 26 U.S.C. 5845(j) provides that "[t]he term 'transfer' and the various derivatives of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of."

such count on which petitioner was convicted (see Pet. App. 4a). As to that transaction, petitioner prepared and submitted BATF forms requesting authorization for tax-exempt transfers to and from a law enforcement transferee, but then proceeded to transfer physical possession of the weapons directly to two different, non-exempt recipients. *Ibid.* Even under petitioner's own construction of the statute, the court of appeals' conclusion that he was properly convicted on the basis of those activities is inescapable.

With respect to the other transaction at issue here, petitioner did physically deliver six machineguns to the former Chief of the Seminole Police Department, with the evident understanding that the weapons would be held until petitioner had located a buyer, and then delivered to that buyer at petitioner's direction. Pet. App. 3a. In fact, as the trial evidence disclosed (*ibid.*), the weapons were actually held not by the Seminole police, but by Scribner; and they were finally delivered not by the police department to the ultimate buyer, but by Scribner back to petitioner and then to the buyer. *Id.* at 3a-4a. Petitioner documented that sequence of "physical transfers" as a single transfer from himself to the police department, and a second transfer from the department to the ultimate purchaser. Even without the direct testimony of Scribner as to petitioner's motivations (*id.* at 7a), the jury would have been amply justified in concluding that petitioner arranged the entire transaction as a ruse to avoid payment of the $1,200 in transfer tax due on his sale of the six machineguns to their ultimate non-exempt buyer.

Petitioner argues (Pet. 13-15) that because he in fact delivered several machineguns into the hands of a Seminole police officer, he was required to document and obtain permission for the transfer. That may well be

correct. It does not follow, however, that documenting that transfer satisfied all of petitioner's obligations. From the evidence presented at trial and described by the court of appeals, the jury was entitled to conclude that transfer of the guns to the police was merely an intermediate step in one integrated transaction, the intended and actual result of which was transfer of the firearms by petitioner to a non-exempt purchaser. See Pet. App. 7a. This Court and others have long held that where such intermediate steps have no independent economic, regulatory, or other significance or explanation, but are motivated solely by the desire to avoid taxes otherwise due on the underlying transaction, they may be disregarded for purposes of the tax laws. *E.g.*, *Gregory* v. *Helvering*, 293 U.S. 465, 469-470 (1935); compare *Frank Lyon Co.* v. *United States*, 435 U.S. 561, 583-584 (1978).

The same principle governs in this case. As the court below recognized (Pet. App. 8a), the purpose of exempting law enforcement agencies from payment of the transfer tax on regulated firearms was to permit them to acquire or dispose of firearms for their own use without incurring a federal tax liability. In the case of petitioner's transactions involving the Seminole police, the evidence disclosed that the transfer of weapons bore no relation to police use or to any other governmental function; it was solely an artifice to enable petitioner to avoid payment of $1,200 in transfer taxes on his sale of the firearms to a private party. III Tr. 403; Pet. App. 7a. Likewise, in the case of the fictional transfer of machine-guns and silencers to the Creek County District Attorney's office, the evidence showed that the putative government transferee never received any firearms, but was used only to "paper" the transaction to avoid the transfer tax. Pet. App. 8a. The jury was entitled to

conclude that petitioner arranged the form of both transactions solely for purposes of concealing their substance and avoiding payment of the proper tax, and on that basis to convict petitioner of violating the tax statute.[4]

2. Petitioner argues (Pet. 20-25) that the decision below conflicts "in principle" with this Court's decision in *Cheek* v. *United States*, 498 U.S. 192 (1991). *Cheek* considered the meaning of the term "willfully" in two criminal tax provisions that explicitly contain that term, and held that in that context a defendant's good faith belief that he was not violating the law would preclude a finding of willfulness, regardless of whether the belief was objectively reasonable.[5] See *id.* at 193-194, 201-204.

As the court below explained (Pet. App. 14a-15a), petitioner was prosecuted not merely for non-payment of taxes, but for conspiring to evade payment by misleading

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[4] Petitioner's stated concern (Pet. 8, 15-20) that the holding in this case will make transferors of regulated firearms vulnerable to prosecution in any case where a governmental transferee might later dispose of the same firearms to a non-governmental party is remote from the facts of this case, in which the evidence demonstrated that petitioner always intended to arrange transfer of the weapons involved to non-exempt purchasers, and merely used cooperative government officials to sign sham forms or take temporary physical possession of firearms in order to conceal the substance of the underlying non-exempt transaction.

[5] The only explicit *mens rea* element in 26 U.S.C. 5861 is the requirement that a false entry on a required application, return, or record be made "knowingly." 26 U.S.C. 5861(*l*). The other provisions of the statute presumably require no more for conviction than that the defendant "know the facts that make his conduct illegal." *Staples* v. *United States*, 114 S. Ct. 1793, 1804 (1994). The indictment returned against petitioner charged, however, that petitioner and his co-conspirators acted "knowingly and willfully." Pet. App. 27a, 32a.

BATF through false statements and sham transactions. In that context, any "good faith" defense that may have been available to petitioner was adequately covered by the charge given to the jury. In particular, the district court instructed the jury that petitioner's defense to the conspiracy counts involved denying "that he acted willfully in failing to pay * * * transfer taxes." IX Tr. 1532. The court defined the term "willfully" to mean the doing of an act "voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law." IX Tr. 1528.

In addition, in addressing the false statement counts, the court explained that one of the elements of the offense was "[t]o make or cause the making of a false entry on any application, return, or record required by this chapter, knowing such entry to be false," and that the offense involved "knowingly" making "any false or fictitious oral or written statement." IX Tr. 1529, 1531. The court further defined the term "knowingly" to mean an act "done voluntarily and intentionally" and not "because of mistake or accident or other innocent reason," and explained that "[t]he purpose of adding the word 'knowingly' is to ensure that no one will be convicted of any act done because of mistake or accident or other innocent reason." IX Tr. 1528. In light of those generous instructions, petitioner's claim of a conflict "in principle" with *Cheek* is without merit.[6] See also *United*

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[6] Petitioner cites (Pet. 21) *United States* v. *Morris*, 20 F.3d 1111 (11th Cir. 1994), which held that a defendant charged with filing false tax returns in violation of 26 U.S.C. 7206(1) was entitled to a special "good faith" instruction, in addition to adequate definitions of "knowingly" and "willfully," where the term "knowingly" was not part of the court's definition of the crime itself. 20 F.3d at 1117. The district court's instructions in this case included the

States v. *Pomponio*, 429 U.S. 10, 13 (1976) (per curiam) (where jury is adequately instructed on willfulness, there is no requirement that a separate good faith instruction be given); *Cheek*, 498 U.S. at 201 (citing *Pomponio* with approval on that point).

3. Finally, relying on *United States* v. *Thompson/Center Arms Co.*, 112 S. Ct. 2102 (1992), petitioner claims (Pet. 25-30) that application of the rule of lenity requires reversal of his conviction because the NFA's use of the term "transfer" is ambiguous. As petitioner recognizes (Pet. 26), however, the rule of lenity applies only when a statutory term is ambiguous. See, *e.g.*, *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993); *Thompson/Center Arms Co.*, 112 S. Ct. at 2109; *Moskal* v. *United States*, 498 U.S. 103, 107-108 (1990). As the court of appeals stated (Pet. App. 9a) in rejecting petitioner's invocation of the rule in this case, the sham transactions engineered by petitioner were not "transfers" under any plausible reading of that term as used in the NFA. There was accordingly no ambiguity in the application of the statute to the facts of petitioner's case.

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terms "knowingly" and "willfully" in defining the crimes with which petitioner was charged. See IX Tr. 1525-1529.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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